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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY  DEPUTY

No. 37557-5-II
COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

KENNETH VELDHEER and KAREN VELDHEER,
husband and wife,

Plaintiffs/Respondents

v.

PREMIER COMMUNITIES, INC., a Washington State registered
contractor; INSURANCE COMPANY OF THE WEST,
Washington State Contractor's Bond No. 2174030, a foreign
surety company; and, DEVELOPERS SURETY & INDEMNITY CO.,
Washington State Contractor's Bond No. 572746C, a foreign
surety company,

Defendants/Appellants

VELDHEERS' RESPONSE BRIEF

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I. INTRODUCTION

Respondents Kenneth and Karen Veldheer believe this to be a very simple case. Pursuant to an arbitration agreement with the builder/vendor of their new, poorly-built home, Appellant Premier Communities, Inc., they requested arbitration of their dispute with Premier when Premier failed to make the required repairs under the Warranty. Pursuant to statute, they filed a superior court action and named Premier's contractor's bonds, Appellants Insurance Company of the West (Washington State Contractor's Bond No. 2174030) and Developers Surety & Indemnity Co. (Washington State Contractor's Bond No. 572746C), as defendants as well as Premier. At the arbitration, the Arbitrator awarded the Veldheers monetary damages. At the hearing on the Veldheers' motion for confirmation, the Trial Court confirmed the award and awarded them costs and attorney fees pursuant to contract and statute, later amending its judgment to correct a scrivener's error and to award additional fees. Premier and its bonds appealed the Trial Court's original judgment but not the amended judgment.

Hoping that this case would be amenable to a Motion on the Merits asking this Court to affirm the Trial Court's amended judgment, the

Veldheers made such a motion to this Court. This Court denied the motion. The Veldheers incorporate their Motion on the Merits herein by reference.

II. ASSIGNMENTS OF ERROR

Kenneth and Karen Veldheer assign no error to the Trial Court's Amended Judgment dated April 11, 2008, confirming the Arbitrator's award and awarding the Veldheers costs and attorney fees, and respectfully disagree with Premier's and its bonds' Assignments of Error as to the Trial Court's original judgment.

Issues Pertaining to Assignments of Error and Short Answers

1. Was the Trial Court correct to confirm an arbitration award where the Arbitrator did not exceed his authority? *Yes.*
2. Was the Trial Court correct to award costs and attorney fees to the Veldheers where there was an applicable attorneys' fee provision, where the Arbitrator declined to award attorneys' fees on different grounds, and where the Veldheers were the prevailing parties on the statutory cause of action with a fee provision? *Yes.*

3. Was the Trial Court correct to refuse to go beyond the face of the award and second-guess the Arbitrator's rulings and interpretation? *Yes.*

4. May this Court, pursuant to RAP 2.5, refuse to review any issues not raised below? *Yes.*

III. STATEMENT OF THE CASE

The Veldheers herein incorporate their "Statement of Fact" from their Motion on the Merits by reference, pp. 2-12.

IV. SUMMARY OF ARGUMENT

Pursuant to statute and caselaw, courts in Washington grant great deference to arbitration awards. In its arguments to this Court, Premier invites this Court to go beyond the face of the award and independently interpret the arbitration agreement, something that this Court will not do. Moreover, Premier raises several issues here that it did not raise to the Trial Court. While this Court may refuse to consider these issues (and indeed, the Veldheers respectfully request that this Court do so), the Veldheers will nonetheless respond to Premier's arguments.

V. ARGUMENT

A. This Court Should Affirm The Amended Judgment

Premier did not appeal the Trial Court's amended judgment, but

only its original judgment. This Court should affirm the amended judgment without further argument.

B. Standard of Review

Premier has essentially raised two issues: whether the Trial Court erred in confirming the Arbitrator's award and whether the Trial Court erred in awarding the Veldheers costs and attorney fees. On the issue of confirmation, this Court has held, "[t]he very purpose of arbitration is to avoid the courts. It is designed to settle controversies, not to serve as a prelude to litigation." Westmark Properties, Inc. v. McGuire, 53 Wn. App. 400, 402, 766 P.2d 1146 (1989) (internal citations omitted). Further, this Court held, "[j]udicial scrutiny of an arbitration award is strictly limited; courts will not review an arbitrator's decision on the merits." *Id.* (internal citations omitted).

This Court has also pronounced the correct standard of review for an award of costs and attorney fees: "Awarding attorney fees under a statute or contract is a matter of discretion with the trial court that we will not disturb absent a clear showing of an abuse of that discretion." Skinner v. Holgate, 141 Wn. App. 840, 857, 173 P.3d 300 (2007) (internal citations omitted).

C. The Trial Court was Absolutely Correct in Confirming the Arbitrator's Award

The Veldheers herein incorporate their argument from their Motion on the Merits, pp. 13-15, subheadings "a" and "b."

D. The Trial Court was Absolutely Correct in Awarding the Veldheers Costs and Attorney Fees

Premier's argument that the Trial Court erred in awarding costs and attorney fees to the Veldheers is itself based on several erroneous premises: (1) that the superior court action in which the Trial Court awarded the costs and fees was filed by the Veldheers in contravention of the arbitration provision in the Warranty, (2) that the Trial Court's award of fees amounted to a modification of the award, which modification the Veldheers had not requested, (3) that the Arbitrator declined to award fees to the Veldheers because the Arbitrator held that the Veldheers were not the prevailing party, (4) that the Trial Court was not authorized to award fees pursuant to statute or contract because the Veldheers' lawsuit was filed in contravention of the arbitration provision in the Warranty, and (5) that there is no attorneys' fee provision in the Warranty that would allow an award of the attorneys' fees incurred in the arbitration.

Each of these contentions is incorrect. Moreover, contentions two through five concern issues not raised below. This Court may refuse to review issues not raised below. RAP 2.5. Without waiving their objection to these improper and untimely issues, the Veldheers will respond.

1. The Veldheers Properly Filed their Superior Court Action

Both Washington's statutory scheme for contractual arbitration, RCW Ch. 7.04A, as well as the Federal Arbitration Act, 9 U.S.C. § 1¹ *et seq*, contemplate that a party seeking enforcement of an arbitration award must necessarily apply to the courts for confirmation. *See, e.g.* RCW 7.04A.050 (Application to Court) *and* 9 U.S.C. § 9 (Award of arbitrators; confirmation; jurisdiction; procedure). Even if the arbitration agreement in the Warranty between the Veldheers and Premier were not inclusive of an application to a court, both the statutes of Washington as well as the federal government would have absolutely required that the Veldheers apply to Thurston County Superior Court for relief.²

1

While the Warranty provided that the provisions of the Federal Arbitration Act would govern the Warranty and the arbitration agreement itself (CP 306), neither party raised this clause to the Trial Court and both argued as though Washington's laws governed.

2

Even if the parties had recognized that federal law governed, the

However, the arbitration agreement in the Warranty *does* provide for the eventuality that one party will have already filed a lawsuit in a court. In the event, says the Warranty, that one party has already filed a lawsuit, such a lawsuit can not be claimed as a “reason to delay, to refuse to participate in, or to refuse to enforce this arbitration agreement.” CP 306. Therefore, the Veldheers did not file their lawsuit in “contravention” of the arbitration agreement in the Warranty.

Moreover, their lawsuit was inclusive of the arbitration they had already requested. The Veldheers attached a copy of their request for arbitration to the complaint (CP11; CP 13-21), and, in their prayer for relief, requested “enforcement of any final arbitration award in this Superior Court action” (CP 12). And, pursuant to the Warranty, when Premier sought dismissal of their superior court action, the Veldheers offered to stipulate to a stay of the action pending arbitration rather than to spend time and money fighting the motion to dismiss. CP 184.

Veldheers would still have filed their action in Thurston County Superior Court. The Federal Arbitration Act provides no independent basis for subject matter jurisdiction (Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n. 32, 103 S.Ct. 927, 74 L. Ed.2d 765 (1983)), and there is neither sufficient diversity of parties nor a sufficient amount in controversy to qualify for diversity jurisdiction in federal court.

Finally, in order to recover against Premier's contractor's bonds, RCW Ch. 18.27 required the Veldheers to file a suit and name the contractor's bonds, in addition to Premier, as defendants. Imagine a hypothetical situation in which a contractor, for whatever reason, was unable to pay a homeowner the amount of the judgment against it. In order to recover any money at all, the homeowner would have had to have already named the contractor's bond or bonds as defendants in the lawsuit, pursuant to RCW Ch. 18.27. Protecting themselves against such a hypothetical eventuality, the Veldheers filed suit against both Premier and the bonds, a suit that *was inclusive from the moment of inception* of the arbitration that the Veldheers had already requested.

2. The Trial Court's Award of Fees Was Not a Modification of the Arbitrator's Award

Premier did not argue to the trial court that any award of fees would be a modification of the Arbitrator's award. This Court may refuse to consider the issue. RAP 2.5. Without waiving their objection, the Veldheers respond that the Trial Court's award of attorney fees and costs was not a modification of the Arbitrator's award.

The Arbitrator declined to award fees and costs to the Veldheers on two bases. He held that the Veldheers had "failed to establish a breach by

Respondent of the Consumer Protection Act,” RCW Ch. 19.86. CP 442.

The Arbitrator also held, “[a]t the hearing Claimant’s counsel also asserted entitlement to attorneys fees under RCW 18.27. The Arbitrator determines that an award of attorneys fees under that statute is not warranted in this arbitration.” *Id.*

The reason that the Arbitrator declined to award fees under RCW Ch. 18.27 is that, in the arbitration, the requisite elements were not present. RCW 18.27.040(6) provides: “The prevailing party in an action filed under this section against the contractor and contractor’s bond or deposit, for breach of contract by a party to the construction contract involving a residential homeowner, is entitled to costs, interest, and reasonable attorneys’ fees.” First, Premier’s bond companies were not parties to the arbitration. The element of having both the “contractor and contractor’s bond” was absent. Second, an arbitration is not an “action filed under this section.” That element was also absent. Therefore, the Arbitrator was entirely proper in refusing to award costs and attorney fees to the Veldheers *in the arbitration.*

In contrast, all the requisite elements in this statute were present before the Trial Court. Both the contractor, Premier, and the contractor’s

bonds, Insurance Company of the West and Developers Surety & Indemnity Co., were defendant parties to the action, which was an action filed under RCW 18.27.040. *See, e.g.*, Complaint at CP 10-12. It was entirely proper for the Trial Court to award costs and attorney fees to the Veldheers in the lawsuit. Moreover, it would have been an abuse of discretion for the Trial Court to *not* award costs and attorney fees. The Veldheers herein incorporate by reference their argument from their Motion on the Merits, subheading “c”, pp. 16-17. Nor was this a modification of the Arbitrator’s award. If the Arbitrator could *not* have awarded costs and fees under that statute, but the Trial Court was *obligated to*, there is no modification of the Arbitrator’s award.

Likewise, the Trial Court did not modify the Arbitrator’s award by awarding fees and costs pursuant to contract. The contract provision states, “Any party shall be entitled to recover reasonable attorney’s fees and costs incurred in enforcing this arbitration agreement.” CP 305. The Arbitrator did not award – nor did he decline to award – any fees or costs pursuant to this contract provision. *See* Award at CP 442. If the Arbitrator had specifically declined to award fees and costs under this contract provision, and the Trial Court had awarded fees and costs

thereunder, then the Trial Court's award would have been a modification of the Arbitrator's award. But that is not the situation here.

In fact, the Trial Court carefully considered whether or not the issue had been before the Arbitrator:

As I read the warranty agreement, the warranty agreement says any party shall be entitled to recover reasonable attorneys' fees and costs incurred in enforcing this arbitration agreement, and yet the arbitrator refused to award attorneys' fees. Is that binding upon this Court?

Having reviewed this, I don't believe that the arbitrator had before him the issue of attorneys' fees. The issue that was submitted for arbitration was the issue of whether or not there was a liability for the damages, and he ruled in that regard.

Now the matter is back before me, it does appear that the parties have agreed there is, indeed, this warranty that was agreed. It's a contract, if you will, that the prevailing party is entitled to attorneys' fees for enforcing the arbitration provisions. For that reason, I feel that attorneys' fees that were incurred during the preparation for the arbitration and in the matters before the Court since that arbitration are properly subject to this Court awarding attorneys' fees and costs.

RP 03/21/08 at pp. 5-6, ll. 4-25, l. 1. The Trial Court concluded, based on the Arbitrator's award which was absolutely silent as to attorney fees pursuant to contract, that the issue was not before the Arbitrator.

Therefore, the Trial Court's award of attorney fees and costs pursuant to contract was not a modification of the Arbitrator's award.

The decision of the Trial Court to award attorney fees and costs pursuant to contract was a matter of discretion. This Court does not disturb such awards absent a clear showing of an abuse of that discretion. Skinner, 141 Wn. App. at 857 (internal citations omitted). “Abuse of discretion occurs when the trial court’s decision rests on untenable grounds or untenable reasons.” *Id.* (internal citations omitted).

Here, the Trial Court’s decision rested on *tenable* grounds and *tenable* reasons. The Trial Court concluded, based on the silence in the Arbitrator’s award, that the issue of attorney fees and costs pursuant to contract was not before the Arbitrator. However, the issue *was* before the Trial Court. It would have been an abuse of discretion for the Trial Court to not award attorney fees and costs to the Veldheers pursuant to contract. The Veldheers herein incorporate by reference their argument in their Motion on the Merits, subheading “c,” pp. 16-17. This Court should not disturb the Trial Court’s award fees and costs pursuant to contract.

3. There is No Indication From the Face of the Award that the Arbitrator Concluded that the Veldheers Were Not the Prevailing Party; The Veldheers *Are* the Prevailing Party

Premier did not argue to the Trial Court that the Veldheers were not the prevailing party, nor yet that the Arbitrator concluded that the

Veldheers were not the prevailing party. This Court may refuse to consider the issue. RAP 2.5. Without waiving their objection, the Veldheers respond that there is no indication from the face of the award that the Arbitrator concluded that the Veldheers were not the prevailing party; moreover, the fact of the matter is that the Veldheers *are* the prevailing party.

Premier argues that the Arbitrator did not award the Veldheers attorney fees and costs because the Arbitrator did not conclude that the Veldheers were not the prevailing party. There is no such indication in the Arbitrator's award. CP 442. For any court to conclude otherwise would mean that the court had engaged in an improper inquiry: going beyond the face of the award and independently interpreting the evidence submitted to the arbitrator. Westmark, 53 Wn. App. at 402 ("courts will not review an arbitrator's decision on the merits.")

Premier also engages in some math and concludes that Premier prevailed on four out of six issues before the Arbitrator, meaning that Premier was the prevailing party rather than the Veldheers. This analysis is incorrect. The Veldheers had two problems with their house: water pooling in the crawl space and defective tiling on the kitchen island. In

their request for arbitration, the Veldheers cited these two problems:

“Water intrusion, see attached declaration and field report,” and

“Defective installation of tile and grout on the kitchen island.” CP 15.

For the first problem, water intrusion, the Veldheers listed three possible warranty sections that could cover the water intrusion problem, sections 1.2, 2.1, and 5.1. *Id.* The Arbitrator concluded that the Veldheers had shown that Premier breached one of those three sections, and awarded the Veldheers a monetary award to remedy the problem of the water intrusion. CP 440-42. For the second problem, kitchen tile, the Veldheers listed one possible warranty section that could cover the problem. CP 15. The Arbitrator concluded that, indeed, the Veldheers had shown Premier had breached that section and awarded monetary damages therefor.

The Arbitrator thus awarded the Veldheers monetary damages on *both* of the problems they had with the house: water pooling in the crawl space and defective tiling on the kitchen floor. The Arbitrator did conclude that the Veldheers had not shown that Premier had breached the Consumer Protection Act (CP 442) and concluded merely that an award of attorney fees under RCW 18.27.040(6) (the statute that provides for attorney fees in a superior court action against a contractor and the

contractor's bond) was not warranted in this arbitration between the Veldheers and Premier, the contractor (CP 442). Premier's calculations, leading to its conclusion that Premier was the prevailing party, are thus based on faulty premises. Premier did *not* prevail on four out of six claims. The Veldheers received a monetary award for *both* of the problems they claimed with their house. Even if they did not show a breach of the Consumer Protection Act, they are still the prevailing party.

In fact, case law also says that the Veldheers are the prevailing party. "In general, a prevailing party is one who receives an affirmative judgment in his or her favor." Schmidt v. Cornerstone Invs., Inc., 115 Wn.2d 148, 164, 795 P.2d 1143 (1990). Here, the Veldheers received an affirmative judgment in their favor. The Arbitrator made them an award of monetary damages on both of the problems (water intrusion and defective tiling) they claimed at the arbitration. "If neither wholly prevails, then the determination of who is the prevailing party depend upon the extent of the relief afforded the parties." Marassi v. Lau, 71 Wn. App. 912, 916, 859 P.2d 605 (1993). Here, the Veldheers wholly prevailed. They received a monetary award for both water intrusion and defective tiling. Applying the Marassi test mandates the same conclusion.

The Veldheers received a monetary award; Premier received no relief.

The Veldheers are the prevailing party.

4. The Trial Court was Authorized to Award Fees Pursuant to Statute or Contract

Premier did not argue to the Trial Court that the Trial Court was not authorized to award fees pursuant to statute or contract, because the Veldheers' action (contends Premier) was filed in contravention of the arbitration provision. This Court may refuse to consider the issue. RAP 2.5. Without waiving their objection, the Veldheers respond that the action was filed in harmony with the arbitration provision, not in contravention thereof, and that the Trial Court was authorized to award fees pursuant to statute and contract. The Veldheers filed their action in harmony with the arbitration provision. *See* argument above. The Trial Court not only was authorized, but was required to award fees pursuant to both statute and contract. *See* RCW 18.27.040(6) and RCW 4.84.330.

5. There is an Attorneys' Fee Provision in the Warranty that Allows an Award of the Attorneys' Fees Incurred in the Arbitration

Premier did not argue to the Trial Court that there was no "applicable" attorneys' fees provision in the Warranty that would allow an

award of the attorneys' fees incurred in the arbitration.³ This Court may refuse to consider the issue. RAP 2.5. Without waiving their objection, the Veldheers respond that there is an applicable attorneys' fees provision.

In the Warranty, the attorneys' fee provision reads: "Any party shall be entitled to recover reasonable attorneys' fees and costs incurred in enforcing this arbitration agreement." CP 205. Pursuant to the Warranty, the only way that a homeowner could enforce the Warranty is *through arbitration. Id.* Consequently, enforcing the arbitration agreement is equivalent to enforcing the entire Warranty.

All of the Veldheers' attorneys' fees were incurred in enforcing the arbitration agreement in order to enforce the Warranty, including, but not limited to fees incurred before the arbitration (both before the Trial Court on the issue of Premier's motion to dismiss as well as before the *Arbitrator* on the issue of Premier's second motion to dismiss; *see* Statement of Fact in the Veldheers' Motion on the Merits), fees incurred in preparing for and appearing at the arbitration itself, in seeking confirmation of the Arbitrator's award, and incurred here on appeal.

3

In fact, Premier argued to the Trial Court that there was no attorneys' fees provision in the Warranty at all. "There is no attorney's fee provision in the Warranty." CP 433.

Washington's legislature has considered the issue of attorneys' fees in contracts. This particular language in this attorney fee provision is analogous to the language in RCW 4.84.330. That statute says, "where such contract or lease specifically provides that attorney's fees and costs, which are *incurred to enforce the provisions of such contract* or lease, shall be awarded to one of the parties, the prevailing party . . . shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements" (emphasis added). The Veldheers are *entitled* to these attorney fees and costs pursuant to contract. The Trial Court was absolutely correct in awarding them.

E. The Veldheers Met Their Burden of Proof

Premier did not argue to the Trial Court that the Veldheers failed to meet their burden of proof. This Court may refuse to consider the issue. RAP 2.5. Without waiving their objection, the Veldheers respond that they did meet their burden of proof. It is clear, both from the face of the Arbitrator's award as well as from the caselaw cited by Premier, that the Veldheers did so.

Premier writes, "[t]o prevail on a claim for breach of contract, a plaintiff must show by a preponderance of the evidence that the contract

imposed a duty, the duty was breached, and the breach proximately caused damage to the plaintiff.” Appellants’ Opening Brief at 16, *citing* this Court’s own NW Indep. Forest Mfrs. v. Dep’t of Labor & Indus., 78 Wn. App. 707, 712, 899 P.2d 6 (1995) (This Court’s opinion in this case was actually silent as to the applicable burden of proof, which is not “preponderance of the evidence” for the *amount* of damages: “Once the fact of damage has been established by a preponderance, the plaintiff is obligated to produce only the best evidence available which will afford [the trier of fact] a reasonable basis for estimating the dollar amount of his loss.” Seattle West. Indust., Inc. v. David A. Mowat Co., 110 Wn.2d 1, 6, 750 P.2d 245 (1988)).

The face of the award indicates that the Arbitrator concluded the Veldheers showed that the contract imposed a duty. The Arbitrator wrote: “Section 5.1 – *Waterproofing* – Claimants have established that Respondent breached this provision. This section states, in part: “Leaks resulting in actual tricking of water through the walls or seeping through the floor are deficiencies.” CP 441. Thus, the Arbitrator concluded that the Warranty imposed a duty on Premier to not have leaks resulting in water coming in through the walls or the floor.

It is also clear from the face of the award that the Arbitrator concluded that the Veldheers established that Premier breached that duty. The Arbitrator used the word “breach” and also stated, “There was no dispute at the hearing that water was actually migrating through the foundation wall at the cold joint and where the sanitary sewer drain pipe penetrates the foundation wall.” CP 441.

As to the damages resulting from the breach, Premier cites to caselaw on the recoverability of lost profits and the calculation thereof: “A plaintiff must also establish the damages resulting from the breach with a reasonable degree of certainty.” Appellants’ Opening Brief at 16, *citing Larsen v. Walton Plywood Co.*, 65 Wn.2d 1, 15, 390 P.3d 677 (1964). Premier also cites to some applicable caselaw, *Shinn v. Thrust IV, Inc.*, 56 Wn. App. 827, 840, 786 P.2d 285 (1990). “[D]amages need not be proven with mathematical certainty, but must be supported by competent evidence in the record.” Here, it is clear from the face of the award that the Veldheers provided the Arbitrator with competent evidence on damages: “Claimant’s expert testified that the evident deficiencies can be cured at a cost of \$32,500. Respondent did not rebut these estimates and provided a cost estimate only for the proposed sump pump remedy.” CP 442.

Premier tries to argue that because the Arbitrator did not reach a conclusion as to the cause of the water intrusion that the cost of repair testified to by the Veldheers' expert could not have a reasonable degree of certainty. In doing so, Premier invites this Court to go behind the face of the award and independently interpret the evidence submitted to the arbitrator. This is an improper invitation. Westmark, 53 Wn. App. at 402 (“courts will not review an arbitrator’s decision on the merits.”)

F. The Veldheers Are Entitled to Attorney Fees and Costs on Appeal

The Veldheers herein incorporate their argument on attorney fees and costs incurred on appeal from their Motion on the Merits, pp. 17-18.

VI. CONCLUSION

Washington’s arbitration laws and the Federal Arbitration Act intend that contractual arbitration should be a way to avoid the courts, not a prelude to litigation. In their appeal, Premier and its bonds have invited this Court to go beyond the face of the arbitration award and to make improper, independent interpretations of the contract between the parties and of the evidence submitted to the arbitrator, something that this Court will not do. This Court should conclude that the Trial Court acted absolutely properly in confirming the award.

Further, Premier and its bonds have argued that the Trial Court erred in awarding attorney fees and costs to the Veldheers. This is a matter of discretion that this Court will not disturb absent a clear showing of abuse of discretion. Here, far from abusing its discretion, the Trial Court also acted absolutely properly in awarding fees. In fact, it would have been an abuse of discretion for the Trial Court to not award fees!

This Court should affirm the Trial Court's amended judgment, and should also award fees and costs incurred on appeal to the Veldheers.

Respectfully Submitted this 4th day of November, 2008.

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CERTIFICATE OF SERVICE

The undersigned declares as follows:

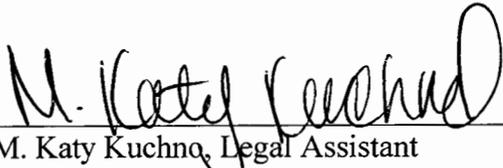
On November 4, 2008, I caused to be served on the undersigned arranged for service of Respondent's Motion for Leave to File Response Brief, to the Court and parties in the manner indicated:

Court of Appeals
Division II
950 Broadway, Suite 300
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M. Katy Kuchno, Legal Assistant